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No. 00-0476

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In The

Supreme Court of the United States

ALACOQUE COLETTE KELLY,

Petitioner,

v.

METHODIST HOSPITAL OF SOUTHERN CALIFORNIA and ELLEN BLACKSTOCK,

Respondents.

On Petition For A Writ Of Certiorari To The California Supreme Court

PETITIONER'S REPLY BRIEF

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REASONS FOR GRANTING THE WRIT OF CERTIORARI

Petitioner respectfully requests that this Court issue the writ of certiorari. The arguments asserted in Respondents' Brief in Opposition have no merit.

In the subject case, the state's highest court *did* have the opportunity to construe the state statute in light of constitutional challenges. The federal questions and constitutional issues, raised herein, were *all* raised in the California Court of Appeal, and again, in the California Supreme Court (App. 45a-46a; 98a-118a).

In fact, the California Supreme Court had ample opportunities to decide *all* of the federal and constitutional issues raised herein throughout the four years in which the case was pending in that Court. The California Supreme Court granted review on *all* of the issues raised herein (App. 107a). Approximately three years after granting review, the California Supreme Court advised the parties that it would not hear argument on whether the Age Discrimination in Employment Act ("ADEA") articulates a public policy basis for plaintiff's claim of wrongful termination (App. 119a-120a). Four years after granting review, and approximately *one week* prior to oral argument, the Court advised the parties that it did not expect the parties to address the constitutional validity of the FEHA exemption at that session (App. 121a-122a).

To be considered by this Court, federal claims must be *either* raised in, or considered and decided by, the state court. *McGoldrick v. Compagnie Generale Transatlantique,*

309 U.S. 430, 434, 60 S.Ct. 670, 84 L.Ed. 849 (1940). Petitioner has satisfied this burden by raising all of the federal questions and constitutional issues in the Court of Appeal and the California Supreme Court.

While failure to comply with a state procedural rule may constitute an independent and adequate state ground which would bar this Court's review of federal and constitutional questions, a state procedural ground is not "adequate" unless the procedural rule is "strictly or regularly followed." State courts may not avoid deciding federal issues by invoking procedural rules that do not apply evenhandedly to all similar claims. *Hathorn v. Lovorn*, 457 U.S. 255, 263, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982). In the subject case, the "procedural rules" cited by Respondents have not been applied evenhandedly by California state appellate courts and are not an adequate ground on which to deny review by this Court.

Although Respondents argue that the issues first raised in the reply brief in the California Court of Appeal were untimely, they are unable to and cannot cite any procedural rule of court or rule of civil procedure to support their position (Resp. Opp. 2-5). In fact, the California Court of Appeal frequently considers arguments first raised in reply briefs. *Adams v. Thornton*, 5 Cal.App. 455 (1907). *Davidson v. Roffy*, 40 Cal.App. 179 (1919). *California National Supply Co. v. O'Brien*, 51 Cal.App. 606 (1921). *Bardeen v. Commander Oil Co.*, 48 Cal.App.2d 355 (1941). *Rayner v. Ramirez*, 159 Cal.App.2d 372 (1958). *Guerrero v. Westgate Lumber Co.*, 164 Cal.App.2d 612 (1958). *Boyd v. Bevilacqua*, 247 Cal.App.2d 272 (1966). *Fox v. Federated Department Stores, Inc.*, 94 Cal.App.3d 867 (1979). *Carman v. Alvord*, 31 Cal.3d 318 (1982). *Luck v. Southern*

Pacific Transp. Co., 218 Cal.App.3d 1 (1990). *Soman Properties, Inc. v. Rikuo Corp.*, 24 Cal.App.4th 471 (1994). *Bockover v. Perko*, 28 Cal.App.4th 479 (1994). *Ochoa v. California State University, Sacramento*, 72 Cal.App.4th 1300 (1999). *People v. Conover*, 243 Cal.App.2d 38 (1966).

Although Respondents further argue that arguments first raised in the petition for rehearing were untimely, they are unable to and cannot cite any rule of court or rule of civil procedure which precludes appellate review of these issues (Resp. Opp. 2-5). In fact, California's state appellate courts frequently consider issues first raised in petitions for rehearing. *Lewis v. City and County of San Francisco*, 2 Cal.App. 112 (1905). *Ambrose v. Alioto*, 65 Cal.App.2d 362 (1944). *People v. Marine Products Co.*, 77 Cal.App.2d Supp. 929 (1947). *Traders & General Ins. Co. v. Pacific Employers Ins. Co.*, 130 Cal.App.2d 158 (1955). *Mounts v. Uyeda*, 227 Cal.App.3d 111 (1991). *Duffy v. Cavalier*, 215 Cal.App.3d 1517 (1989).

Although Respondents argue that the decision of the California Supreme Court was proper in declining to consider issues which had not been timely raised in the California Court of Appeal, the California Supreme Court has frequently considered and decided issues which were not even raised in the California Court of Appeal. *Guz v. Bechtel National, Inc.*, 24 Cal.4th 317 (2000) (See fn. 16). *Broughton v. Cigna Healthplans of California*, 21 Cal.4th 1066 (1999) (See fn. 4). *Cedars-Sinai Medical Center v. Superior Court*, 18 Cal.4th 1, 6-7 (1998).

In the subject case, *all* of the federal questions and constitutional issues were timely raised in the California Court of Appeal. We have previously noted that legal

theories and questions of law may be first raised on appeal, under a "de novo" standard applicable to review of summary judgments (Pet. 7). California law also permits state appellate courts to consider constitutional issues first raised on appeal when they pertain to important issues of public policy (Pet. 7). California law further permits state appellate to consider legal issues first raised on appeal when there is an intervening change in law (Pet. 7-8). The authorities cited by Respondents are inapposite because they involve no issue of "de novo" review of summary judgment. Two cases were criminal cases. *People v. Cookson*, 54 Cal.3d 1091 (1991). *People v. Bransford*, 8 Cal.4th 885 (1994). The third case, *REO Broadcasting Consultants v. Michelle Edith Martin*, 69 Cal.App.4th 489 (1999), involved review of an administrative decision which had already been affirmed by the trial court. The fourth case, *T. Lake County Mental Health Dept. v. Susan T.*, 8 Cal.4th 1005 (1994), involved a motion to suppress evidence in a conservatorship proceeding. In sum, the authorities cited by Respondents do not establish a "long-standing" established rule of procedure which would bar review by this Court.

The issues in this case continue to have far-reaching implications. Despite recent amendments, the Fair Employment and Housing Act ("FEHA") continues to completely exempt parochial schools and religiously affiliated universities, retirement homes, day care centers, newspapers, radio stations, thrift stores and soup kitchens. The FEHA also continues to partially exempt religiously affiliated health care facilities, permitting these employers to discriminate against persons in executive and pastoral care positions on the basis of their sex,

age, race, national origin, ancestry, color, disability and religion. *Cal. Govt. Code*, § 12926.2 (App. 79a-81a).

As previously discussed, thirteen other states afford complete exemptions to religious employers, permitting them to discriminate on the basis of sex, age, race, national origin, ancestry, color, disability and religion (App. 81a-84a). The issues raised herein have wide applicability to many other statutes and they have arisen with increasing frequency in the lower courts (App. 84a-90a; 92a-97a; 123a-140a). As an example, the subject case was recently cited as authority, under SB 41, for permitting religiously affiliated hospitals to refuse contraceptive health insurance coverage to their employees. *California Lawyer, "Getting Religion"* (November 2000). Further, the issue of whether exemptions would undermine discrimination laws was raised in Congress during recent debates on the Religious Land Use and Institutionalized Persons Act of 2000 (S. 2689). (BNA) *Employment Discrimination Report* 15:5 at p. 146 (8/2/00). A decision by this Court would resolve the controversy inherent in these issues.

Lastly, Respondents argue that the California Supreme Court has merely construed the intended reach of a state remedial statute in a manner which is consistent with this Court's own decisions. *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987). *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987). These issues have been addressed in the Petition and need not be reiterated here (Pet. 12-14; 22-27).

This not merely a decision in which the state's highest court has construed a state statute in accordance with

its plain language and "permissible" legislative purpose. Rather, the Court has adopted a construction which violates the United States Constitution. The Court has endorsed religion by unjustifiably and broadly favoring those employers, claiming religious missions and affiliations. The Court has treated persons employed by "religious employers" as "second-class" citizens, entitled to no protection from discrimination under state law. The Court has cast a blind eye to federal law. The Court's decision, as applied, violates the Establishment Clause, the Equal Protection Clause and the Supremacy Clause of the United States Constitution. These violations should not go unnoticed by this Court.

Respectfully submitted,

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Dated: November 3, 2000